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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 RAMIRO RAMOS-MEDINA,

15 Defendant.

CASE NO. 08cr3418 JM

ORDER DENYING MOTION TO  
DISMISS INDICTMENT

16 Defendant Ramiro Ramos-Medina moves to dismiss the indictment due to an allegedly invalid  
17 deportation. Defendant contends that his October 4, 2007 conviction for first degree burglary in  
18 violation of California Penal Code §459 is not an aggravated felony and therefore he may collaterally  
19 attack the July 13, 2008 final order of removal. Plaintiff opposes the motion. For the reasons set forth  
20 below, the court denies the motion to dismiss the indictment.

21 **BACKGROUND**

22 On August 13, 2008 Border Patrol Agents responded to a sensor activation located on the  
23 Northeast corner of Barrett Lake and south of Camp Barrett Sheriff Department's Detention Facility.  
24 The area is known for alien smuggling activities. Upon arrival at the scene, agents discovered  
25 footprints and followed them.

26 As the Agents climbed the hill in the area, people started running through the thick brush.  
27 Over the next 20-30 minutes, the Agents rounded up 18 individuals. The Agents conducted a field  
28 immigration interview and all individuals, including Defendant, stated that they were in the country

1 illegally. Defendant was transported to the Brown Field Border Patrol Station where he allegedly  
2 waived his Miranda rights and again stated that he was in the country illegally. On October 8, 2008  
3 Defendant was indicted on a one count indictment charging him with being a deported alien found in  
4 the United States in violation of §1326(a) and (b).

5 The Administrative Removal of Defendant

6 On June 25, 2008 Defendant was interviewed by ICE Agent Valenzuela, a fluent Spanish  
7 speaker, while incarcerated at Calipatria State Prison. Defendant was serving a two year incarceration  
8 term for first degree residential burglary in violation of Cal Penal Code §459. Based upon this  
9 conviction, Agent Valenzuela determined that Defendant was an aggravated felon and therefore  
10 subject to administrative removal. At that time, Defendant represented that he did not oppose  
11 removal. Defendant was also advised that he or a colleague would return in a couple of weeks with  
12 paperwork on the administrative removal and provide a listing of legal services.

13 On July 10, 2008 Agent Lopez, also a fluent Spanish speaker, served Defendant with a "Notice  
14 of Intent to Issue a Final Administrative Order." The Notice indicated that Defendant had been  
15 convicted on October 4, 1997 for first degree residential burglary and received a two year prison term.  
16 The Form I-851 indicated that he was deportable as an aggravated felon pursuant to 8 U.S.C.  
17 §1101(a)(43)(F). Agent Lopez does not recall if Defendant requested to see an immigration judge.  
18 Agent Lopez explained the form to Defendant and that he was not eligible for relief from deportation  
19 because of the aggravated felony conviction. On July 16, 2008 Agent Lopez returned and served  
20 Defendant with the Final Administrative Removal Order. Agent Lopez believed that Defendant  
21 understood the administrative removal procedure and that he chose not to contest the Final Order.  
22 Defendant was removed on August 8, 2008.

23 Criminal History

24 In the past 10 years Defendant has two felony and two misdemeanor convictions. On August  
25 26, 1999 Defendant was convicted of felony transportation of a controlled substance and sentenced  
26 to 180 days in jail and three years probation. On January 14, 2002 Defendant was convicted of two  
27 misdemeanors for (1) driving while intoxicated and (2) forging an official seal. On October 4, 2007  
28 Defendant was convicted of first degree residential burglary in violation of Penal Code §459 and

1 received a two year prison sentence.

## 2 DISCUSSION

3 Defendant contends that his conviction for first degree residential burglary in violation of Cal.  
4 Penal Code §459 does not correspond to the generic meaning of burglary as required by binding  
5 precedent and therefore his conviction is not an aggravated felony within the meaning of 8 U.S.C.  
6 §§1101(43)(F) and (G). As a consequence, Defendant moves to dismiss the indictment because he  
7 was not removable as charged in the removal order. The Government opposes the motion.

8 A defendant in a §1326 prosecution may collaterally attack the prior deportation before trial  
9 and preclude the government from relying on such deportation where “the deportation proceeding was  
10 so procedurally flawed that it effectively eliminated the right of an alien to obtain judicial review. .  
11 . .” United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996), cert. denied, 117 S.Ct. 1096  
12 (1997). The collateral attack of a prior deportation is statutorily permitted only if:

- 13 (1) the alien has exhausted any administrative remedies that may have been available  
14 to seek relief against the order,
- 15 (2) the deportation proceedings at which the order was issued improperly deprived the  
16 alien of the opportunity to seek relief against the order; and
- 17 (3) the entry of the order was fundamentally unfair.

18 8 U.S.C. §1326(d)(1-3). An underlying removal order is fundamentally unfair if (1) a defendant’s due  
19 process rights were in fact violated and (2) he suffers prejudice. United States v. Gutierrez-Alba, 128  
20 F.3d 1324 (9th Cir. 1997). To establish prejudice, Defendant must show that he had “a plausible  
21 ground for relief from deportation. USA v. Ualdo-Figueroa, 346 F.3d 1042, 1050 (9<sup>th</sup> Cir. 2004).

22 Under the categorical approach first articulated in Taylor v. United States, 495 U.S. 575  
23 (1990), an offense is an aggravated felony if “the full range of conduct covered by the [criminal  
24 statute] falls within the meaning” of the relevant definition of an aggravated felony. Penuliar v.  
25 Mukasey, 528 F.3d 603, 608 (9th Cir.2008) (quoting Chang v. INS, 307 F.3d 1185, 1189 (9th  
26 Cir.2002)). The generic definition of burglary “contains at least the following elements: an unlawful  
27 or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a  
28 crime.” Taylor, 495 U.S. at 598. The underlying state burglary statute, Penal Code §459, is not  
appropriately analyzed under the categorical approach because §459 eliminates the “requirement that  
the entry [into a dwelling] be unlawful.” Taylor, 495 U.S. at 599. Under §459 one can be convicted

1 of burglary where the entry into the dwelling or other structure is permissive. United States of  
2 America v. Rodriguez-Rodriguez, 393 F.3d 849, 852 (9<sup>th</sup> Cir. 2005), cert. denied, 544 U.S. 1041  
3 (2005). Here, the full range of conduct targeted by the burglary statute is broader than the generic  
4 definition of burglary and therefore not susceptible to analysis under the categorical approach.

5 Where a criminal burglary statute is broader than the generic crime, the United States Supreme  
6 Court instructs that “the trial court need find only that the state statute corresponds in substance to the  
7 generic meaning of burglary.” Taylor, 495 U.S. at 600.

8 “Where a state statute is categorically broader than the generic definition of a crime, we employ a  
9 modified categorical approach.” Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir.2007) (en  
10 banc). Under this approach, the court conducts “a limited examination of documents in the record of  
11 conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of  
12 the elements of the generically defined crime.” Chang, 307 F.3d at 1189.

13 Under the modified categorical approach, the court concludes that Defendant was convicted  
14 of a crime of violence, first degree residential burglary in violation of Cal. Penal Code §459, and  
15 therefore an aggravated felony within the meaning of 8 U.S.C. §1101(43)(F), based upon judicially  
16 noticeable facts showing that Defendant was convicted of all elements of generic burglary under  
17 Taylor. During the plea colloquy, Defendant stipulated to the factual basis for the crime as identified  
18 in the probation report. (Gov’t Exh. 16 at 5). Based upon the stipulated factual basis for the plea, it  
19 is readily ascertainable that Defendant unlawfully entered the victim’s apartment to commit a theft  
20 offense therein. Defendant removed a window screen to enter the apartment. As the victim arrived  
21 at her apartment she heard a banging noise and observed Defendant running away. (Gov’t Exh. 14).  
22 The court concludes that the factual basis for the crime satisfies the generic definition of burglary  
23 because Defendant unlawfully entered the apartment to commit an offense therein.

24 Moreover, the Ninth Circuit has determined on several occasions that first degree residential  
25 burglary under §459 constitutes a crime of violence under 18 U.S.C. §16(b). In United States v.  
26 Becker, 919 F.2d 568 (9<sup>th</sup> Cir. 1990) the Ninth Circuit addressed a first degree residential burglary  
27 conviction under §459 in the context of the Career Criminal Act:

28 The confluence of common sense and precedent lead to the conclusion that the  
unauthorized daytime entry of the dwelling of another with the intent to commit a

larceny or any felony carries with it a substantial risk that force will be used against the person or property of another. Therefore, first degree burglary under California law [§459] is a “crime of violence. . . .”

Id. at 573. In Rodriguez-Rodriguez, 393 F.3d 849, the Ninth Circuit held that the trial court committed reversible error when it failed to enhance the defendant’s sentence by sixteen levels pursuant to U.S.S.G. §2L1.2(b)(1)(A) because a conviction for first degree residential burglary in violation of §459 constitutes a crime of violence. Id. at 853.<sup>1</sup> Accordingly, under the modified categorical approach §459 corresponds in substance to the generic meaning of burglary and qualifies as a crime of violence within the meaning of 18 U.S.C. §16(b).

Defendant contends that this court is bound to follow a recent three-panel decision in United States v. Aguila-Montes de Oca, -- F.3d --, 2009 WL 115727 (9<sup>th</sup> Cir. 2009) which held that the modified categorical approach outlined in Taylor, Becker, and Rodriguez-Rodriguez can no longer be applied to convictions under §459 because the California statute is missing the necessary element that entry into a dwelling must be unlawful. Id. This court cannot resolve conflicting panel decisions. Rather, this court is obligated to follow binding precedent. In this circuit,

a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, [however] we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir.2002) (internal citation and quotations omitted). The primary Supreme Court authority cited by the Aguila-Montes panel in its analysis is Taylor. However, Taylor is not an intervening authority and stands for the proposition that the modified categorical approach applies to a state’s burglary statute that “eliminat[es] the requirement that the entry be unlawful.” Taylor, 495 U.S. at 599. Further, in discussing the modified categorical approach the Supreme Court held in Taylor that “the trial court need find only that the state statute corresponds in substance to the generic meaning of burglary.” Taylor, 495 U.S. at 599 (emphasis added). Accordingly, the court concludes it is bound to follow the legal precedent set forth in Taylor, Becker and Rodriguez-Rodriguez.

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<sup>1</sup> The court notes that Defendant’s first degree residential burglary conviction is also an aggravated theft or burglary offense under 8 U.S.C. §1101(43)(G).

1 Defendant also argues that the en banc decision in Navarro-Lopez “impliedly overruled”  
2 earlier cases applying the modified categorical approach to first degree residential burglary  
3 convictions. (Motion at p.5:27-28). The relevant issue in Navarro-Lopez was whether a conviction  
4 for accessory after the fact in violation of Cal. Penal Code §32 is a crime of moral turpitude. 503 F3d  
5 at 1073-74. Unlike a conviction under §459, the Ninth Circuit concluded that a conviction for  
6 accessory after the fact was missing the elements of a crime of moral turpitude. There is simply no  
7 indication that the en banc decision of Navarro-Lopez sought to overrule Becker or Rodriguez-  
8 Rodriguez. To the contrary, the Ninth Circuit reiterated that the modified categorical approach  
9 “applies when the particular elements in the crime of conviction are broader than the generic crime”  
10 but not when the “crime of conviction is missing an element of the generic crime altogether.” Id. at  
11 1073. Because Navarro-Lopez is not sufficiently on point and deals with a separate criminal statute,  
12 the court declines to find that Navarro-Lopez overruled earlier precedents directly addressing first  
13 degree residential burglary under §459.

14 In sum, the motion to dismiss the indictment is denied.

15 **IT IS SO ORDERED.**

16 DATED: February 18, 2009

17   
18 Hon. Jeffrey T. Miller  
United States District Judge

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